

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT M. NAYLOR,

Defendant-Appellant.

UNPUBLISHED

October 27, 2000

No. 214827

Oakland Circuit Court

LC No. 97-150296-FH

Before: Markey, P.J., and Murphy and Collins, JJ.

PER CURIAM.

Defendant was charged with felonious assault, possession of a firearm during the commission of a felony, and obstruction of justice following an altercation between defendant and his former girlfriend. A jury acquitted defendant of obstruction of justice and convicted him of assault and battery, MCL 750.81; MSA 28.276, and felony-firearm, MCL 750.227b; MSA 28.424(2). Defendant appeals by right. We affirm, but remand for a correction of the judgment of sentence.¹

Defendant first argues that he was denied his right to a fair trial when the prosecutor made a critical misstatement of the law during her closing argument. Because defendant failed to object to the alleged misstatement of the law, our review is limited to whether the conduct was so egregious that no instruction could have removed the prejudice to the defendant or whether manifest injustice would result from failure to review the alleged misconduct. *People v Kelly*, 231 Mich App 627, 638; 588 NW2d 480 (1998); *People v Paquette*, 214 Mich App 336, 341-342; 543 NW2d 342 (1995). Because the error is unpreserved, defendant must show a plain error that affected substantial rights. *People v Carines*, 460 Mich 750, 773-774; 597 NW2d 130 (1999).

¹ The judgment of sentence in this case states that defendant was convicted of felonious assault, MCL 750.82; MSA 28.277. However, the jury verdict form and the trial transcript clearly indicate that defendant was convicted of the lesser misdemeanor offense of assault and battery, MCL 750.81; MCA 28.276. We remand for a correction of the judgment of sentence. *People v Avant*, 235 Mich App 499, 521-522; 597 NW2d 864 (1999).

The test for prosecutorial misconduct requiring reversal of the conviction is whether the defendant was denied his right to a fair and impartial trial. *Paquette, supra* at 342. A prosecutor's clear misstatement of the law that remains uncorrected may deprive a defendant of a fair trial. *People v Matulonis*, 115 Mich App 263, 267-268; 320 NW2d 238 (1982). However, where the defendant does not object to the alleged misstatement or request a curative instruction, appellate review is precluded unless a curative instruction could not have eliminated the prejudice. *Kelly, supra*; *People v Federico*, 146 Mich App 776, 798-799; 381 NW2d 819 (1985).

We agree with defendant that the prosecutor misstated the law when she informed the jury that "[t]he Judge will also instruct you that even if you don't find beyond a reasonable doubt that a felony has occurred, you may still convict the Defendant of Felony Firearm." Although the jury need not convict the defendant of an underlying felony in order to find him guilty of felony-firearm, the jury must find that the defendant committed or attempted to commit a felony. *People v Lewis*, 415 Mich 443, 454-455; 330 NW2d 16 (1982); *People v Davis*, 196 Mich App 597, 601; 493 NW2d 467 (1992), overruled on other grounds sub nom *People v Miles*, 454 Mich 90; 559 NW2d 299 (1997). However, because defendant did not object to the error, defendant's conviction should only be reversed if the error created prejudice that could not be cured by a cautionary instruction. *Kelly, supra*.

In this case, the prejudice resulting from the misstatement was curable, and was, in fact, cured. Following closing arguments, the court delivered jury instructions including the standard Michigan criminal instruction on felony-firearm. CJI2d 11.34. The court correctly instructed the jury that in order to convict defendant of felony-firearm, it must find beyond a reasonable doubt that defendant committed or attempted to commit the crime of felonious assault. *Lewis, supra*. We have held that a trial court's subsequent proper instruction on the law is sufficient to cure the prejudice created by a prosecutor's earlier misstatement of law. *Federico, supra* at 799; *People v Solak*, 146 Mich App 659, 677; 382 NW2d 495 (1985). Any prejudice that resulted from the prosecutor's erroneous statements on felony-firearm was cured by the court's subsequent proper jury instruction. Defendant's substantial rights were not affected, *Carines, supra*, and defendant's conviction will not be reversed on this basis.

Defendant next argues that the trial court erred by failing to specifically instruct the jurors that they could not convict defendant of felony-firearm unless they found that defendant committed a felony. Because defendant did not object to the alleged instructional error, appellate review is precluded absent manifest injustice. *People v Cooper*, 236 Mich App 643, 648; 601 NW2d 649 (1999). A criminal defendant may obtain relief based on an unpreserved error if the error is plain and affected substantial rights. *Carines, supra*.

The trial court is required to instruct the jury regarding the applicable law and fully and fairly present the case to the jury in an understandable manner. *People v Moore*, 189 Mich App 315, 319; 472 NW2d 1 (1991). The instructions must include all elements of the charged offense and must not exclude material issues, defenses, and theories, if there is evidence to support them. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). Even if the instructions are imperfect, no error occurs "if they fairly presented the issues to be tried and sufficiently protected the defendant's rights." *Id.*

Defendant is correct that the court did not inform the jurors that they must find that defendant committed or attempted to commit a felony in order to convict him of felony-firearm; however, the court properly stated that the first element of the felony-firearm crime was “that the Defendant committed or attempted to commit the crime of felonious assault” Because felonious assault was the only charge that could serve as the underlying offense to the felony-firearm charge, this was a correct statement of the law as applied to the facts of this case. See *Lewis, supra* at 454-455. Although the court did not instruct the jurors that they could not use the lesser included misdemeanor offenses as the basis for a conviction on the charge of felony-firearm, the court made it clear which offense was the appropriate underlying felony. *People v Bonham*, 182 Mich App 130, 136; 451 NW2d 530 (1989). The fact that the jury chose not to convict defendant of felonious assault does not call into question the validity of the felony-firearm conviction because jury verdicts on multi-count indictments need not be consistent. *Lewis, supra* at 449. Viewed as a whole, the instruction fairly presented the elements of the offense and sufficiently protected defendant’s rights. *Daniel, supra* at 53.

Defendant attempts to argue that the jury was confused about the elements of felony-firearm, citing an affidavit of a juror that the trial court refused to allow defendant to introduce at his motion for new trial. Because this affidavit was not a part of the lower court record, it will not be considered in this appeal. *Kent Co Aeronautics Bd v Dep’t of State Police*, 239 Mich App 563, 579-580; 609 NW2d 593 (2000). Defendant’s argument lacks merit in the face of the general presumption that jurors follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). In addition, confusion in this case was unlikely given that the jurors had a written copy of the felony-firearm instruction during their deliberations. Presuming that the jurors correctly followed the judge’s instruction to convict defendant of felony-firearm only if they found that he committed or attempted to commit felonious assault, we conclude that no manifest injustice resulted and defendant’s substantial rights were not affected.

We affirm defendant’s convictions, but remand for a correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Jeffrey G. Collins